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IN THE

Supreme Court of the United States

October Term, 1998

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF OF ACORN, ET AL., AMICI CURIAE IN SUPPORT OF RESPONDENTS

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December 8, 1998

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IDENTITY AND INTEREST OF THE AMICI CURIAE

Pursuant to Supreme Court Rule 37, the organizations listed below respectfully submit this brief amicus curiae in

support of Respondents Brenda Roe and Anna Doe, et al.[1] Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Amici are:

Association of Community Organizations for Reform Now ("ACORN") (a national organization with local chapters)

EMPOWER of Monroe County (Rochester, NY)

Hospitality House, Inc. (Hinckley, ME)

Independent Heights Welfare Rights Union (Houston, TX)

Kensington Welfare Rights Union (Philadelphia, PA)

Los Angeles Coalition to Erase Hunger and Homelessness

Make the Road by Walking (Brooklyn, NY)

Multi-County Clients Council (Louisville, KY)

9 to 5's Poverty Network Initiative (Waukesha, WI)

Northeast Missouri Client Council for Human Needs, Inc. (Hannibal, MO)

Oakland County Welfare Rights Organization (Pontiac, MI)

Ohio Welfare Rights Organization (Columbus, OH)

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[1] Pursuant to Supreme Court Rule 37.6, the amicus curiae organizations listed in the text above affirm that no counsel for any party in this case authored this brief in whole or in part, and that no person or entity other than amici curiae, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

Poor & Working Class Moms (Mankato, MN)

Reform Organizations of Welfare ("ROWEL") (St. Louis, MO)

Roberts Village Resident Management Corporation (Norfolk, VA)

Sisters in Portland Impacting Real Issues Together (Portland, OR)

State Organization of Client Councils (Columbus, OH)

Washington Welfare Reform Coalition (Seattle, WA)

Welfare Rights Organizing Coalition (Seattle, WA)

Welfare Warriors (Milwaukee, WI)

Women for Economic Security (Chicago, IL)

Workfairness (New York, NY)

These organizations are membership organizations of low income individuals or organizations that include a coalition of membership organizations and low income individuals.

They and the members of their organizations are concerned that the arguments presented to this Court by Petitioner and amici supporting Petitioner do not reflect the challenges which low income Americans face daily and the reality of the world in which they live. Rather, Petitioner and their amici attribute motivation to individuals and legislatures that are based upon assumptions about human behavior that are untrue or at best simplistic and unrepresentative.

Amici respectfully set forth below facts they believe accurately represent the reality of the lives of poor Americans who have migrated and suffered grievous injury through the application of durational residency requirements. These

persons have endured homelessness. They have been forced to choose between seeing their children suffer extreme want or returning to an abuser or batterer. They have suffered, or been threatened with, harm for no reason other than their attempt to move to seek a better future.

Amici also urge the Court to examine the intent of various legislatures that have considered and adopted similar provisions which is, when stripped of its rhetoric, to deter poor people from moving into the state, and to penalize them if they do.

This examination of the reality of poor people's lives and legislative intent will, amici hope, help persuade the Court that durational residency requirements are inconsistent with the fundamental federal character of this nation, with the rights persons have as citizens of the state in which they reside, and with the right of each individual to migrate to another state in the hope of pursuing a better, or at least safer, life.

STATEMENT OF THE CASE

At issue in this action is a challenge to the constitutionality of California's durational residency requirement contained in Section 11450.03. Section 11450.03, states, in relevant part:

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

Cal. Welf. & Inst. Code § 11450.03 (hereinafter the "California Restriction").

In August 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of

1996 ("PRWORA"), 42 U.S.C. §§ 601, *et seq.* The PRWORA significantly increased the states' discretion to design their federally supported welfare plans without seeking waivers from the Secretary. The Act superseded the AFDC program with a new program entitled Temporary Assistance to Needy Families ("TANF"). The Act authorized the states to apply a one-year durational residency requirement of the kind embodied in Cal. Welf. & Inst. Code § 11450.03. *See* 42 U.S.C. § 604(c).[2] In October 1996, the State of California submitted its TANF plan to the United States Department of Health and Human Services. The plan included a durational residency limitation consistent with California law and § 604(c). On February 28, 1997, in All-County Letter 97-11, the California Department of Social Services instructed the counties to implement the California Restriction (§ 11450.03) as of April 1, 1997.

Brenda Roe and Anna Doe commenced this action on April 1, 1997, brought as an equal protection claim under 42 U.S.C. § 1983, to prevent California from implementing the California Restriction, each having recently moved to California seeking employment and being eligible for assistance. They argued that the California Restriction threatened them with imminent harm; namely, the denial of vital benefits necessary for their sustenance.

The district court entered a temporary restraining order enjoining implementation of the California Restriction, pending a hearing on plaintiffs' request for a preliminary injunction. Finding that the plaintiffs demonstrated the possibility of irreparable harm and that California would not be

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[2] The PRWORA provides:

> A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months. 42 U.S.C. § 604(c) (Supp. 1997).

unduly harmed, the district court on June 4, 1997, granted the preliminary injunction, citing its prior reasoning in *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993) regarding the probability of success on the merits. *Roe v. Anderson*, 966 F. Supp. 977 (E.D. Cal. 1997). On April 23, 1997, on the stipulation of the parties, the district court granted class certification.

In finding that Roe and Doe had demonstrated a probability of success on the merits, the district court determined that the apparent purpose of the California Restriction was to deter migration of poor people to California. The State of California appealed the grant of a preliminary injunction to Brenda Roe, Anna Doe, and a certified class of all others similarly situated. The Ninth Circuit declined to decide the merits of the appeal, but determined that appellees established a likelihood of success on the merits and the possibility of irreparable harm. This Court granted certiorari on September 29, 1998.

SUMMARY OF ARGUMENT

The recent use of durational residency requirements is driven by the states' desire to exclude poor newcomers. This desire to exclude the poor is based on a series of myths and stereotypes which are belied by the factual circumstances of the plaintiffs who have challenged durational residence requirements. In reality, poor people move to seek a better life in areas of greater employment opportunity, to be near family, to seek a haven from violence, and for many other reasons having nothing to do with higher welfare benefits. They and their children are severely deprived by durational residency requirements such as the California Restriction at issue here.

The California Restriction is unconstitutional under both the Privileges and Immunities and Equal Protection Clauses because it treats long-term residents and more recent residents differently for no legitimate reason. As such, the California

Restriction cannot survive constitutional scrutiny under any existing test under which a state must justify a classification it makes among its residents.

Congressional approval and funding of California's welfare scheme neither immunizes the California Restriction from constitutional scrutiny nor alters the appropriate standard of scrutiny.

STATEMENT OF FACTS

I. HISTORICAL PRECEDENTS FOR RENEWED RESTRICTIONS ON THE MOBILITY OF POOR NEWCOMERS.

The California Restriction is the result of a recent resurgence of political efforts to exclude poor newcomers by states and localities, and to limit their mobility, which have their roots in a series of enactments which have restricted the movement of indigents for over 600 years. These restrictions, appearing repeatedly in English statutes of the Fourteenth through the Seventeenth Centuries, culminated in the Act of Settlement and Removal of 1662[3]—the source upon which American colonists drew most heavily in framing their own statutes. These restrictions took a variety of forms. Those most closely related to the statute before the Court limited public responsibility for the relief of poverty to residents of the local community.[4] Those provisions were descendants of earlier laws, antedating public assistance, which limited the solicitation of alms to the indigent's parish.[5] The effort to limit the mobility of the poor was further reflected in the removal provisions of the Act of 1662, which empowered public authorities forcibly to return an indigent to his place of settlement whether or not he had sought aid. Finally, the

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[3] 13 & 14 Charles II c. 12 (1662).

[4] 14 Elizabeth c. 5 (1572); 39 Elizabeth c. 3 (1598).

[5] 19 Henry VII c. 12 (1503); 22 Henry VII c. 12 (1530-31).

English Law also provided severe criminal penalties for begging and leaving employment and even for leaving one's place of settlement without permission.[6]

The earliest of these restrictive laws, the Statutes of Laborers of Edward III, and many of their successors, were, in the view of concerned scholars, designed to assure feudal lords an adequate supply of agricultural labor.[7] Moreover, "No servant or laborer . . . shall depart at the end of his term . . . to serve or dwell elsewhere . . . unless he bring a letter [under the King's seal]." 12 Richard III c. 3 (1388). In later years, this design was displaced by other concerns, which, as will be shown, have reemerged in the context of contemporary welfare discourse. The poor were feared as a source of criminal disorder. As Parliament found, "In all places throughout this realm, vagabonds and beggars have of long time increased [producing] continual thefts, murders, and other heinous offences of great enormities . . . ."[8] Their travel was thought to encourage the spread of disease and pestilence. Anticipating problems of modern occurrence, the restrictions also betrayed a fear of urban congestion and attendant disorder.[9]

American history demonstrates that certain colonists brought with them many of the attitudes underlying these restrictions on mobility. Many of the restrictive measures touched on above were imported into the early law of the colonies and their successor states. Indeed, a primary rationale

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[6] *See, e.g.*, 23 Edward III c. 1 (1349), 5 Elizabeth c. 4 (1562) and 14 Elizabeth c. 5 (1572).

[7] In service of this objective, no worker was permitted to go "out of the town where he dwelleth in the winter, to serve in the summer . . ." 25 Edward III c. 7 (1351) Second Statute of Laborers. *See also* 23 Edward III c. 7 (1349) First Statute of Laborers.

[8] 22 Henry VIII c. 12 (1530-31).

[9] Dorothy Marshall, *The English Poor in the Eighteenth Century* (London, George Rutledge, 1926), Chaps. V and VI.

for exclusion of the poor, their purported "moral pestilence", continues to color debate and policymaking on welfare.

That view finds modern expression in a panoply of myths and racial and gender stereotypes which now animates the welfare debate. Whether or not they are recipients of public assistance, the poor are subject to unrelenting attacks on their morality. A prime example is embodied in the welfare magnet "theory". We respectfully submit that this "theory" defames the underprivileged by attributing to them the intent to travel the states, leaving jobs, family and friends, to exploit the public assistance of state governments, without any evidence that differential welfare benefits are or will be a significant impetus to interstate migration. As demonstrated by the circumstances of the plaintiffs who have challenged these restrictions, the welfare magnet "theory" is one more myth, now invoked to justify the imposition of cruel deprivations on poor newcomers who move for a variety of reasons other than the receipt of public assistance.

II. THE RECENT REIMPOSITION OF DURATIONAL RESIDENCY REQUIREMENTS HAS BEEN DRIVEN BY THE STATES' DESIRE TO EXCLUDE POOR NEWCOMERS.

Race- and gender-based American stereotypes of the poor attribute to indigent Americans the following traits: (1) laziness, (2) lack of morals, (3) irresponsible sexual conduct, (4) criminal predisposition, (5) substance abuse, (6) bad parenting and (7) dependency on the public dole.[10]

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[10] Labels that encapsulate these stereotypes range from "pauper", "hard-core poor", "welfare dependent", "slum-dweller", "vagrant", "ne'er-do-well", "white trash", "street urchin", "beggar", "panhandler", "the culturally deprived", "hobo", and, the most recent label, "the homeless". *See* Herbert J. Gans, *The War Against the Poor: The Underclass and Antipoverty Policy* 3 (1995); Beverly Horsburge, *Schrodinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-*

Based on these stereotypes, many legislatures draw the conclusion that the poor are undeserving of our support and worthy only of exclusion.[11]

While state legislatures are no doubt entitled to enact laws based on legitimate legislative findings, the myths driving welfare policy threaten to further ostracize indigent Americans, who plainly constitute a discrete and insular minority vulnerable to political oppression. The "moral pestilence" of earlier days has been replaced by the image of the "Welfare Mother" or "Welfare Queen"—the mainstream belief being that the typical woman on welfare has numerous illegitimate children, primarily to receive even greater welfare benefits.

These false stereotypes go far to explain the admission of many states that their durational residency requirements are, in fact, intended to deter migration of the poor. Indeed, the state of California admitted at oral argument in the Court of Appeals, "in response to the suggestion that the purpose of § 11450.03 is to keep poor people out of the state [that] 'it does not want people to move to California with a mindset of economic dependency'". *Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998). That statement is a flat admission that the State of California has imposed the California Restriction

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Income Women of Color, 17 Cardozo L. Rev. 531, 535 (1996) ("The stereotype of the lazy Black welfare queen of low intelligence, who breeds children in order to avoid working, dominates the public discussion on the federal budget."); David T. Ellwood, *Poor Support* 5 (1988) (pointing out that Americans do not consider the money received by the elderly and the disabled to be "welfare"); Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 Va. L. Rev. 2523, 2523-24 (1995) (describing the "conservative" view, in which it is "morally reckless" to have additional children without sufficient financial resources).

[11] Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare*, 1890-1935, at 2-3, 5-6 (1994) (discussing the development of negative connotations for "welfare" programs, in contrast to the neutral, or even positive connotations attached to social insurance programs).

for the purpose of deterring the settlement of poor persons in the state. Moreover, California's prior representation to this Court that the statute merely "removes California's relatively high AFDC benefit levels, for a period of one year, as one of the factors a person might consider when contemplating a move to California," Pet. Br. at 21 (*Anderson v. Green*, No. 94-197), also admits the state's exclusionary purpose.

The available legislative history demonstrates that the desire to exclude poor newcomers is the driving force behind the recent reenactment of durational residency requirements.

The Wisconsin statute expressly provides that the evaluation of its scheme shall determine "whether the demonstration project deters persons from moving to this state." Wis. Stat. § 49.19(llm)(e). Wisconsin's waiver application introduces its subject matter with a lengthy excerpt from a speech by Governor Pete Wilson of California, condemning the "exploding" growth in welfare spending in that state and attributing it to newly arrived welfare recipients. Wisconsin Department of Health and Social Services, Application for Federal Assistance: "Two-Tier AFDC Benefit Demonstration Project" 2-3 (June 26, 1992). Wisconsin is portrayed as facing a similar crisis. The proposal for a multi-tier scheme in selected parts of the state is based upon the "intuitive conclusion that the differential in benefits is inducing families to move to Wisconsin in search of higher benefits." *Id.* at 5. The first "hypothesis" of the project is that,

> [I]n counties where the two-tiered policy is implemented, there will be a reduction in the percentage of new AFDC recipients who previously resided in a state other than Wisconsin, when compared to the non-demonstration counties for the same time period . . . .

Id. at 26. This "hypothesis" reveals the project's objective: to achieve the projected effect by deterring migration.

The waiver applications submitted by Illinois, Iowa, and Wyoming each describe the purpose in seeking to implement a multi-tier scheme as being to "reduce the incentive" for families to move to the state.

Illinois' waiver application hypothesized that its scheme would result in "a lower percentage of the Illinois AFDC caseload that received AFDC *from other states* in the year prior to moving to Illinois" and a resulting "savings." Illinois Department of Public Aid, Application for Federal Assistance: "Relocation to Illinois Project" 7 (October 1, 1992). The sponsor of the provision in the Illinois legislature agreed that the measure was aimed at preventing the State from "becoming a welfare magnet." *Transcription Debate,* State of Illinois, 87th General Assembly, House of Representatives, 167th Legislative Day at 6 (July 30, 1992). Another legislator questioned the measure's constitutionality, but supported its objective: "while . . . it seems to make sense that we should try to prohibit people from other states coming into Illinois to get larger benefits, it appears very clear that this is unconstitutional." *Id.* at 1.

Iowa's waiver application bluntly declared that: "The [multi-tier] proposal would reduce the incentive for families to move to Iowa for the purpose of receiving Iowa's higher public assistance grants." Iowa Department of Human Services, Application for Federal Assistance: "Iowa Family Investment Program" 75 (April 17, 1993). One state legislator explained, "With all the empty houses in southern Iowa, many out-of-state recipients move to Iowa to get the higher rate." *Mail Call,* Sumner Gazette, October 8, 1992 (Letter from Ray Lageschulte, Iowa State Representative).

Wyoming's waiver application announced that the purpose of the multi-tier benefit scheme was to "reduce the inventive for families to move to Wyoming to receive public assistance." Wyoming Department of Family Services, Application for

Federal Assistance: "Wyoming Relocation Grant" 1 (December 24, 1992). The State continued:

> This project would demonstrate the effectiveness of a proposal *which is intended to discourage clients to move to Wyoming* for a higher public assistance grant.

Id. Throughout its application Wyoming speaks of "reducing the incentive" to migrate, and "discouraging" migration, interchangeably as project goals.

Intent to deter migration is found in other states as well. In Minnesota, the trial court found "a strong inference that the legislature enacted the durational residency requirements to impede the less fortunate from migrating to Minnesota," *Davis v. Doth*, (slip op., p. 12. July 31, 1998). In Rhode Island, the state's witness on the legislative process testified at the preliminary injunction hearing that the Committee was concerned that "there would be perhaps significance in migration which would have very significant costs . . . ." *Westenfelder v. Ferguson*, 998 F. Supp. 146, 156 n.15 (D.R.I. 1998) And in New Jersey, "a spokeswoman for the State . . . said the provision was intended to dissuade people from moving to New Jersey . . . ." *The New York Times*, July 9, 1998, p. B5.

The available legislative history thus proves that the driving motivation in imposing these new durational residency requirements is to deter poor newcomers.

III. THE FACTUAL CIRCUMSTANCES OF THE PLAINTIFFS WHO HAVE CHALLENGED DURATIONAL RESIDENCY REQUIREMENTS DEMONSTRATES THAT POOR PEOPLE MOVE TO IMPROVE THEIR LIVES AND THAT THEY ARE SEVERELY DEPRIVED BY DURATIONAL RESIDENCY REQUIREMENTS.

The factual circumstances of the persons who have challenged the newly resurgent durational residency requirements such as the California Restriction demonstrate that: (1) no plaintiff chose to move solely in order to obtain increased welfare benefits; (2) each plaintiff's right to migrate was in fact penalized; (3) parents and children were severely harmed by the restrictions; and (4) their attempt to improve their condition by moving to other states was significantly impacted by the restrictions.

The circumstances surrounding Respondent Brenda Roe's application for public assistance, as described by the district court below, provides a prime example.

Brenda Roe was a resident of Oklahoma until early 1997. When her husband lost his job, the Roes decided to move to California to pursue employment. Ms. Roe was six months pregnant on April 8, 1997. Ms. Roe states that because of complications that developed in her pregnancy after their move to California, Mr. Roe was unable to leave her unattended and therefore could not work. Ms. Roe was informed by the state social services office that she would be limited to the Oklahoma monthly grant level of $307 when she became eligible for AFDC at the six-month point of her pregnancy, as compared to the California grant level of $565. The monthly rents in the community in which they now reside, Long Beach, California, are $300 for a studio apartment and $450 to $650 for a one-bedroom apartment. Ms. Roe avers that at the time she and her husband decided to move to California she did not

know anything about AFDC or TANF and had never been on welfare.

Numerous other plaintiffs have been forced to seek public assistance because of conditions imposed on them similar to those of Ms. Roe. Ms. Tajuanna Davis, plaintiff in *Davis v. Doth*, No. 620C6-9-010231 (Minn. St. Dist. Ct. Dec. 5, 1997), moved to Minnesota from Illinois in June, 1996, to escape domestic violence, and to pursue self-help in a battered women's shelter. Ms. Davis lived in Minnesota until May, 1997, when she moved to Mississippi because of concerns about crime in her St. Paul neighborhood. After 2½ months in Mississippi, inadequate transportation and limited job opportunities forced her to return to Minnesota to look for secretarial office work in which she was experienced.

When Ms. Davis applied for public assistance, she was deemed ineligible for AFDC until she had resided in Minnesota for 30 days; thereafter, she would receive the benefit amount for a family of three in Mississippi: $120 per month. It being obvious that $120 per month was inadequate to maintain sustenance for Ms. Davis and her three children while in Minnesota, Ramsey County offered to pay to transport her and her family back to Mississippi or Illinois. Because Ms. Davis' abuser resided in Illinois, and no work was available in Mississippi, Ms. Davis chose to stay in Minnesota, but at the price of having to reside for a time in an emergency shelter with her children until moving in with friends. Her plight was the direct result of the state's denial of public assistance in the amount of $412 per month which she would have received but for the fact that she was a new resident.

In *Westenfelder v. Ferguson*, 998 F. Supp. 146 (D.R.I. 1998), Ms. Westenfelder had resided in Rhode Island since 1991, except for one month in 1997 when she moved to Massachusetts to help her mother. She returned to Rhode Island because housing was cheaper and she could still commute to her job. After she lost her job she applied for

public assistance. Because of her recent return to Rhode Island, the state imposed limitations on her public assistance solely because she was a "new" resident. Those limitations resulted in a public assistance payment which was lower than her rent. Another plaintiff in *Westenfelder*, Joanne Davenport, had been a resident of Rhode Island for *40 years*. She was the grandmother and sole caretaker of two minor children nearly since their birth. For three months in 1997, the children resided with their mother in Pennsylvania. When they returned to their grandmother, she was advised that their public assistance benefits would be reduced because of their absence from the state.

The family of plaintiff Douglas Brown in *Brown v. Wing*, 649 N.Y.S.2d 988 (N.Y. Sup. Ct. Oct. 18, 1996), had lived on a farm in New York for three generations. Brown lived and worked in New York except for two years in the military service until 1984, when he, his wife, and their two children moved to Florida to assist his mother and sister in building their homes. He lived and worked in Florida for three years. In 1987 he moved back to New York with his younger son, who has lived in the state since then. In 1992 he moved back to Florida to help his 82 year old mother. For the next three years he engaged in seasonal work in Florida in the winters and New York in the summers. In 1995 he was hospitalized in a veteran's hospital in Florida with severe depression. He moved back to New York in 1996 at his therapist's suggestion. His conditioned worsened, however, and he applied for cash assistance as he was about to become homeless. He was denied aid under the durational residency law then in effect, which has since been permanently enjoined.

In *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wisc. 1992), plaintiffs Vanessa and Kevin Jones lived in Milwaukee County and were denied general relief benefits because they had not resided in Wisconsin for 60 consecutive days. They arrived in Wisconsin with their three children on November 22,

1988, intending to spend the Thanksgiving holidays with a family friend. They arrived late at night and stopped at the bus station so their children could use the rest rooms. When they returned from assisting their children, their suitcases were on the sidewalk and their friend was gone. Prior to coming to Milwaukee, they lived in Chicago, Illinois. They were not employed at the time they arrived in Wisconsin due mainly to circumstances surrounding a fire in their previous home. Being stranded in Milwaukee on November 22, 1988, they decided to remain there and seek work. In an affidavit made part of the record in that case, Vanessa and Kevin Jones state:

> We have decided to stay in Milwaukee because we feel that this is a safer place to live and that it would be a good environment for our children to grow up in. We feel that the schools are better than those in Chicago because there is more structure and discipline. We believe that we could obtain jobs here, find a decent affordable place to live and make a new start. We were not able to do that in Chicago. . . . The only property our family owns is our personal possessions. We have no resources. We do not have any money, income, property or credit or any other means sufficient to obtain food, housing or other necessities.

At the time the Jones family offered that statement, they resided at the Salvation Army Emergency Lodge, a shelter for homeless persons.

Jane Doe, plaintiff in *Doe v. Wing*, No. 98/2903 (N.Y. Sup. Ct. July 30, 1998) had lived in Rochester from infancy in 1955 until 1990, where she worked a variety of jobs. She moved to Florida that year with her husband, seeking job opportunities. Her marriage ended in 1992. She continued working in Florida until she became ill in 1997. She then learned she was infected with the HIV virus. Her sister came to Florida and brought her back to be with family in Rochester.

Her family provided emotional support, but could not provide financial support. New York threatened to pay reduced welfare benefits because of her newcomer status, but the provision has not been implemented.

Green v. Anderson, 811 F. Supp. 517 (E.D. Cal. 1993), involved three plaintiffs. Plaintiff Deshawn Green was a Sacramento resident for twelve years and then moved to Louisiana in 1985. She had two children in Louisiana. in December 1992, Ms. Green decided to move back to California where her mother lives. The full monthly California AFDC grant for a family of three is $624; under the two tier system for the next twelve months Ms. Green was to receive $190 a month, which is what she would have received in Louisiana. Plaintiff Debby Venturella came to California in December 1992. She had one child and was pregnant. She had been living in Oklahoma for six weeks when she decided to move to California where her parents lived. She was not receiving AFDC benefits in Oklahoma. Finally, plaintiff Diana Bertollt moved to California from Colorado to be with relatives. She has one child and will be limited to $280 a month—the Colorado benefit—as opposed to the full California amount of $504 for two family members. *All three plaintiffs explained that they moved to California to escape abusive family circumstances.*

Persons and families denied aid for lack of residence must either live under the most deprived conditions or move on to some other place. Many who remain are forced to rely upon private charity or impoverished relatives. Families become fragmented as a result of the necessity to remove children from their homes while their parents struggle to find employment. Children may also find themselves placed at substantial public expense in foster homes or institutions whose benefits are not

dependent on residency.[12] For some, the prospect of moving "home" may be not only unwise but even life-threatening, placing young children in serious risk of physical harm.[13]

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[12] The state hearing examiner during the administrative hearing prior to the institution of *Mantell v. Dandridge*, Civil Action No. 18792 (D. Md. 1967), stated in connection with the residence requirements that there have been cases of children being placed in foster care and being supported by state money "because we couldn't give them Aid to Dependent Children". *Transcript of Appeal Hearing*, August 3, 1967, p. 11.

[13] Adequate income supports, including welfare benefits, do make a difference to women who have left batterers. *See* Wendy Pollack, *Twice Victimized—Domestic Violence and Welfare Reform*, 30 Clearinghouse Review, Special Issue 239, 330 (1996). The most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him. Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J. of L. and Public Policy 245 (1994); Edward W. Gondolf & Ellen R. Fisher, *Battered Women as Survivors: An Alternative to Treating Learned Helplessness* 95-96 (1988); *see also*, Ida M. Johnson, *Economic, Situational, and Psychological Correlates of the Decision-Making Process of Battered Women*, 73 Fam. in Soc'y: J. Of Contemp. Human Serv. 174-75 (1992); Lewis Okun, *Women Abuse: Facts Replacing Myths*, 55 (1986) (citing studies that find women commonly return because they lack economic resources); B.E. Aguire, *Why Do They Return? Abused Wives in Shelters*, 30 Social Work 350, 350 (1985).

Battered women must have a "sound bridge out of poverty", Edward W. Gondolf & Ellen R. Fisher, *supra*, at 94, in order to afford to live safely and separately from their abusive partners. Battered women who have risked and survived assault following separation from their abuser nevertheless will be penalized by the California durational residency requirement. The inadequacy of the financial assistance provided to new residents may force them to return to violent situations. Alternatively, the denial of adequate assistance may result in homelessness. *See* Joan Zorza, *Women Battering*, 25 Clearinghouse Rev. 421, 422 (1991) (31 percent of abused women in New York City shelters returned to their batterers primarily because they could not locate long-term housing). For a more comprehensive examination of the impact of durational residency requirements on battered women, we respectfully direct the court to the Brief of Amici Curiae Fifty Organizations Serving Domestic Violence Survivors in Support of Respondents.

ARGUMENT

I. THE CALIFORNIA RESTRICTION IMPOSES AN UNCONSTITUTIONAL BURDEN ON MS. ROE'S RIGHT TO TRAVEL AND HER PRIVILEGES AND IMMUNITIES AS A CITIZEN OF THE UNITED STATES OF AMERICA.

The opinions of this Court have consistently affirmed that "[f]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution". *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 901 (1986) (citing cases from *The Passenger Cases*, 7 How. 283 (1849) through *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

Relevant recent cases involving that freedom having relied upon the Equal Protection and Privileges and Immunities Clauses of the Constitution in analyzing the impact of state laws denying public assistance or other governmental benefits to new residents. *See, e.g., Shapiro v. Thompson, supra*; *Zobel v. Williams*, 457 U.S. 55, 71 (concurring opinion of Justice O'Connor) (1986). Both analyses accept as their point of departure the fundamental nature of an individual's right to move from one state to another. This Court's equal protection analysis asks whether the legislative distinction imposes a significant burden arising from the exercise of that right and requires any such burden be justified by proof that the distinction is necessary for the attainment of a compelling state interest. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974). Other courts have struck down state laws imposing residence requirements for the receipt of public benefits because such restrictions have been found to lack a rational relationship to attainment of a legitimate state purpose. *Hicks v. Peters*, 10 F. Supp.2d 1003 (N.D. Ill. 1998); *Maldonado v. Houstoun*, 117 F.R.D. 311 (E.D. Pa. 1997), *aff'd*, 157 F.3d 179 (3d Cir. 1998).

Courts applying the Privileges and Immunities Clause ask whether a legislative distinction between residents and non-residents (or more recently arrived residents) "burdens" the exercise of a basic right or essential activity. Where a legislative distinction imposes a significant financial burden as a result of an individual's exercise of the right to travel and reside in a new state, those courts ask whether "the non-citizens constitute a peculiar source of the evil at which the statute is aimed" and if so, whether there is "a substantial relationship between the evil and the discrimination practiced against the non-citizens". *Zobel v. Williams*, 457 U.S. 55, 76 (1982) (concurring opinion of Justice O'Connor) (quotations omitted). In *Zobel*, this analysis was applied to strike down an Alaska statute which conferred preferential benefits upon longtime state residents drawn from the state's oil revenues which could amount to no more than $1,050 per year.

The California Restriction is unconstitutional under both the Privileges and Immunities and Equal Protection Clauses. The principal argument advanced by Petitioner State of California is that limiting Ms. Roe's means of subsistence to $307 per month and denying her an additional $258 in public assistance on the ground that she recently moved to California does not constitute a burden on the exercise of the right to travel because she continues to receive the level of public assistance provided by the state of Oklahoma.

That fact is irrelevant to this Court's constitutional analysis under both the Privileges and Immunities and the Equal Protection Clauses. The distinction at issue is that between new and longer-term residents of the State of California. The fact that new residents of California may receive the same level of assistance as residents of Oklahoma or some other state is irrelevant to any conceivable justification of the distinction drawn between new and longer-term California residents. "States must treat residents and nonresidents without unnecessary distinctions . . . ." *Zobel*,

457 U.S. at 76 (concurring opinion of Justice O'Connor) (quotations omitted). In *Shapiro*, the Court struck down a requirement which operated "to create two classes of needy resident families indistinguishable from each of other except that one is composed of residents who have resided a year or more and the second of residents who have resided less than a year, in the jurisdiction." *Shapiro*, 394 U.S. at 627. To say, as does the State of California, that Ms. Roe "would not be any worse off . . . than [she] would have been had [she] not exercised [her] right to travel . . ." is no defense to her claim that she is being discriminated against, as compared to longer-term California residents. Nor is it a denial of the inescapable fact that the state has imposed a burden-laden distinction upon Ms. Roe solely as a result of her decision to move to California.

To argue that the burden imposed upon Ms. Roe is so insubstantial as to merit disregard by this Court is a callous denial of the realities of deprivation described above. The deprivations are unarguably more pervasive and severe than the partial denial of medical assistance in *Maricopa County* or the thousand dollar oil bonus in *Zobel*.

To argue that Ms. Roe has not provided sufficient evidence of the state's purpose to deter poor newcomers is to ignore the evidence described above, including the state's admissions before this Court and the court below. As importantly, it ignores the historical context of the reenactment of durational residency requirements which plainly marks them as an atavistic resurgence of the tendency to brand and confine the indigent newcomer.

While the evidence presented above leaves little doubt concerning California's intent to deter migration of the poor, this Court cannot reasonably make the constitutionality of durational residency requirements imposed upon indigent migrants turn upon the strength of the evidence of specific legislative intent in a particular case. Nor can the outcome

sensibly depend on the varying success with which litigants demonstrate the effect of such restrictions on interstate migration, as a factual matter, from case to case. The predictable variation in outcome which would result from either requirement would disserve both the Privileges and Immunities and Equal Protection Clauses of the Constitution.

To establish the constitutionally relevant burden on the right of travel should require only recognition that the California Restriction necessarily imposes a severe and pervasive burden on poor newcomers which is based on a legislative distinction between new and longer-term residents of a state. That distinction plainly burdens both the individuals' right to travel and their right to be accorded the privileges and immunities accorded by the State of California to its own residents. That course of action would also accord proper recognition to the historical record of discrimination against the indigent migrant. Whether Ms. Roe is labeled a "pauper," a "vagrant" or, in modern parlance, a "welfare queen", she remains the target of a discriminatory attitude of which the nature and necessary effect of the California Restriction is, itself, sufficient proof.

II. NO LEGITIMATE STATE INTEREST JUSTIFIES THE CALIFORNIA RESTRICTION.

Given the burdens imposed by the California Restriction, the state is required to present a persuasive justification, whether the issue be addressed as an Equal Protection question or a Privileges and Immunities question. Under the Privileges and Immunities Clause, the state must demonstrate that: (1) the non-citizens constitute a peculiar source of the evil at which the statute is aimed; and (2) the Court must find "a substantial relationship between the evil and the discrimination practiced against the non-citizens". *Zobel*, 457 U.S. at 76. Phrased in equal protection terms, the state must demonstrate that the distinction serves a state interest. The nature of the state interest—whether legitimate or

compelling—and the precise relationship—whether rational or necessary—depends on this Court's characterization of the state practice involved. To date, the Court has required that a legislative distinction which significantly burdens the right to travel be justified as necessary to the attainment of a compelling state interest. *Shapiro*, 394 U.S. at 634; *Maricopa County*, 415 U.S. at 254; *Soto-Lopez*, 476 U.S. at 911. In *Zobel*, the Court found the Alaska preference discriminatorily awarding an oil bonus to longer-term residents to violate the Equal Protection Clause upon application of the less demanding rational relationship test. *Zobel*, 457 U.S. at 65.

The California Restriction is unjustifiable whatever the test applied. One of the more remarkable aspects of the State of California's brief is that the state makes absolutely no attempt to justify the California Restriction. The Court will search that brief in vain for a section, a paragraph, even a sentence in which the state presents its policy justification for discriminating against poor newcomers. While that failure would be sufficient to dispatch any private litigant, this Court has traditionally been more indulgent in its treatment of public authorities. Any such indulgence in this case would make no difference to its outcome.

No one has suggested any policy reason which could justify the discrimination imposed by the California Restriction. Under the Privileges and Immunities Clause, the state must demonstrate that the non-citizens are a peculiar source of the evil at which the statute is aimed and that there is a substantial relationship between the evil and the discrimination sought to be justified. *Zobel*, 457 U.S. at 76. Under the Equal Protection Clause, the state must, at a minimum, demonstrate that the "distinction" between new arrivals and longer-term residents rationally serves some "valid state interests". *Id.* at 65. None of the interests advanced by the state's amici suggests any valid policy interests which

justify the "*distinction*" between new arrivals and longer-term residents which is the core of the California Restriction.

Ms. Roe's amici start with the fundamental principle that deterring the migration of the deprived is not a constitutionally acceptable state purpose.

> "[T]he purpose of inhibiting migration by needy persons into the State is constitutionally impermissible". *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).
>
> "The only apparent justification for the retrospective aspect of the program favoring established residents over new residents is constitutionally unacceptable." *Zobel v. Williams*, 457 U.S. 55, 65 (1982).

All of the justifications proffered by the state's amici are constitutionally deficient because they uniformly fail to justify the discrimination imposed by the California Restriction or constitute a reformulation of the constitutionally impermissible purpose of deterring and discriminating against new residents. Amici argue three principal justifications: (1) reducing welfare costs; (2) encouraging work; and (3) eliminating the so-called welfare magnet effect. None of these purported justifications justify the distinction at issue.

Applying Justice O'Connor's analysis under the Privileges and Immunities Clause, new residents are obviously not a peculiar source of poverty in the State of California. In equal protection terms, they are not distinguishable from longer-term residents of California because both groups are equally needy. The constitutional problem arises from the fact that the state refuses to treat equally indigent newcomers in an evenhanded way. The state of California has numerous constitutional means of limiting the costs of welfare. Discrimination against new arrivals is not one of them.

Recasting the argument as a means of warding off the so-called "Race to the Bottom" syndrome, in which states successively slash their welfare benefits, does nothing to justify the discrimination against poor newcomers. For the state to argue that it will reduce benefits to all public assistance recipients if it is not allowed to discriminate against new arrivals is not to justify the discrimination. It is more in the nature of federal blackmail. Once again, the state's asserted interest does not justify the distinction by articulating a legitimate state interest which is applicable to the disfavored group alone. Indeed, it is more in the nature of an admission of the stated discriminatory purpose. The state is saying that if it is allowed to discriminate against the new arrivals, it will treat its favored group of longer-term residents even more favorably. Effective constitutional protection of the disfavored group requires that the state be prohibited from treating the favored class of longer-term residents more favorably.

Similarly, California's desire to increase employment and encourage self-reliance is not an interest which is peculiarly relevant to the situation of new arrivals. Legitimate public interest in encouraging employment may justify a variety of incentives designed to reduce the need to utilize public assistance but it does not justify a distinction which imposes a harsh regime of deprivation on new arrivals alone. The state's interest in fostering employment is incapable of articulation in terms that justify discriminating against poor newcomers.

Finally, the so-called "welfare magnet" theory of exclusion articulates no legitimate justification for the discrimination because it is premised on a violation of the Constitution. *Shapiro* and *Zobel* have clearly stated that the deterrence of poor migrants is a constitutionally impermissible state interest and, despite the changing tenor of judicial opinion concerning the right to travel, no court has ever questioned that fundamental principle. To accept the welfare magnet theory of discriminatory exclusion of poor migrants requires a

repudiation of a long history of judicial decisionmaking under both the Equal Protection and Privileges and Immunities Clauses for which there is no justification.

III. CONGRESSIONAL APPROVAL OF DURATIONAL RESIDENCY REQUIREMENTS DOES NOT IMMUNIZE SUCH STATUTES FROM CONSTITUTIONAL SCRUTINY AND DOES NOT ALTER THE APPLICABLE STANDARD OF REVIEW.

Under the Personal Responsibility and Work Reconciliation Act of 1996 ("PRWORA"), Congress authorized durational residency requirement of the sort contained in § 11450.03. *See* PRWORA, 42 U.S.C. § 604(c). As part of PRWORA, Congress replaced AFDC with a new block grant program known as Temporary Assistance for Needy Families ("TANF"). *See* 42 U.S.C. at §§ 601(a), 604(a) (Supp. 1997). As such, the United States as amicus curiae contends that "in the context of the nationwide, federally funded TANF program, the constitutional question [is] whether the particular limitation adopted by California is sufficiently tailored so that it may fairly be regarded as 'substantially related' to the national governmental interests furthered by that authorization". Brief of United States at 19. That position is untenable.

It is well-settled that "Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the states to violate the Equal Protection Clause." *Katzebach v. Morgan*, 384 U.S. 641, n.10 (1966). The same is true of the Privileges and Immunities Clause. *See* Tribe, *American Constitutional Law* at 525.[14] The right to

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[14] Laurence H. Tribe, American Constitutional Law § 6-33, at 525 (2d ed. 1988) ("Properly understood, the privileges and immunities clause of article IV, § 2, likewise confers a personal right against state action unjustifiably discriminating against out-of-stater, whether or not such

travel has been held to be part of the liberty protected against actions of the federal government by the Fifth Amendment. *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958). *See also*, *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964). This fundamental tenet of Constitutional law cannot be abrogated merely by demonstrating that the state has "sufficiently tailored" an otherwise unconstitutional scheme or that the scheme is "substantially related" to such congressional objective.

The court below specifically addressed the question of whether congressional enactment of the PRWORA with its language approving residency requirements affects the Ninth Circuit's pre-PRWORA holding that residency requirements were unconstitutional and correctly determined that Congress' passage of PRWORA "does not affect the constitutional analysis". *Roe*, 134 F.3d at 1404. That PRWORA may intend to encourage states to implement "experimental" welfare programs or that PRWORA itself constitutes a "change in the welfare system as we know it" provide no basis for exemption from the requirements of the Privileges and Immunities and Equal Protection Clauses.

Congress' power to pass welfare legislation or control the use of federal funding provide no legitimate basis for reinventing the applicable standard of review to be employed by federal courts. Congress' ability to alter the constitutional calculus employed by the federal courts must be based, at a minimum, on some textual constitutional source, not on merely the strength of Congress' coffers.

Any legislative distinction, whether state or federal, which burdens a poor newcomer's right to travel must meet applicable constitutional requirements. At minimum, any such distinction must be justified by reference to some policy which rationally and constitutionally distinguishes between poor

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discrimination has purportedly been sanctioned by Congress.").

newcomers and longer-term residents. The justification must be based on some policy which is applicable to the newcomer and not the longer-term resident. And the justification cannot constitutionally be any form of limitation on the poor newcomer's right to travel and settle in another state. The brief submitted by the United States as amicus conspicuously fails to do that.

The United States describes the ostensibly justifying purpose as "achieving interstate integration and coordination, preventing the distortion of incentives and promoting the effectiveness of the federal program"—a formulation so vague as to articulate no rational basis for differentiating between poor newcomers and longer-term residents (Brief of United States at 10).

To the extent that the United States attempts any more particularized policy statement, it falls into the same deficiencies as plague the state's other amici. The United States seeks to justify imposing discriminatory treatment of poor newcomers either by appealing to factors which do not rationally differentiate between the two classes of recipients (*i.e.*, encourage public assistance recipients to work; encourage states to give higher levels of public assistance); or to factors which constitute an admission of an intention to deter interstate migration by public assistance recipients (the so-called welfare magnet theory) which would otherwise take place—a constitutionally impermissible purpose.

CONCLUSION

For the foregoing reasons, we respectfully submit that the California Restriction is unconstitutional under both the Equal Protection Clause and the Privileges and Immunities Clause. The Ninth Circuit's judgment should be affirmed.

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Respectfully submitted,

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